ITT Lighting Fixtures, Division of ITT Corporation *and* Jo Ann Gray *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 26-CA-7710, 26-CA-8007, 26-CA-8029, and 26-CA-8581-2

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 17 July 1981 Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge dismissed all but one complaint allegation. He found that Respondent violated Section 8(a)(4), (3), and (1) of the Act by transferring employee Winnie Williams to the more onerous position of greasing tabs and retaining her in this position because of her union activities and because she gave testimony in an earlier Board hearing.

Respondent argues that this allegation should be dismissed because it is based solely on the revival of an allegation specifically deleted from the original charge in this case. In so arguing, Respondent renews a contention previously addressed to the Board. On 9 October 1980 Respondent filed a motion for partial summary judgment in which it alleged that the allegation concerning Williams' transfer to a more onerous position, contained in Case 26-CA-8029, should be dismissed because it was based on the revival of an allegation that had been specifically deleted in an amendment to the original charge nearly 12 months earlier. Respondent made similar procedural objections to the other two allegations concerning Williams' transfer which were based on the charge in Case 26-CA-7710. The Board denied Respondent's motion without prejudice.[1] We now find merit in Respondent's position.

The relevant procedural history of these allegations is as follows. An amended charge was filed in Case 26-CA-7710 on 2 April 1979, alleging, *inter alia*, that the transfer of Winnie Williams was violative of the Act. Subsequently, an amended consolidated complaint issued on 10 August 1979 in Cases 26-CA-7710, 26-CA-7781, and 26-CA-7792. However, Williams' transfer was not included in this complaint. These cases, 26-CA-7710, 26-CA-7781, and 26-CA-7792, were heard before an Administrative Law Judge on 9-11 October 1979.[2] Respondent filed exceptions to the Administrative Law Judge's Decision and on 20 April 1982 the Board issued its Decision and Order.[3]

On 7 September 1979 the charge was filed in Case 26-CA-8029 alleging, *inter alia*, that employee Winnie Williams was discriminatorily transferred to a more onerous position due to her union membership and because she testified at the hearing in Case 26-CA-7710. This charge was amended on 16 October 1979, but the allegation relating to Williams was deleted from the amended charge. The General Counsel admits that this allegation was deleted from the charge after his investigation disclosed that it had no merit. On 19 October 1979 the Regional Office issued an amended consolidated complaint (consolidating the charges in Cases 26-CA-8029 and 26-CA-8007).[4] The consolidated complaint similarly did not contain any allegations pertaining to Winnie Williams.

Thereafter, on 11 August 1980 the charge was filed in Case 26-CA-8581-2, alleging that Respondent violated Section 8(a)(1), (3), and (4) of the Act by denying Winnie Williams a promotion in July 1980 because of her union activities and because she filed charges under the Act. After investigation of this charge, the Acting Regional Director issued the amendment to the amended consolidated complaint, which contained not only the allegations in Case 26-CA-8581-2, but also the allegations concerning Winnie Williams set out in the original charges filed in Cases 26-CA-7710 and 26-CA-8029.

The instant hearing was held before Administrative Law Judge J. Pargen Robertson. At that time Respondent again moved for dismissal of the allegations concerning Williams which had been re-

[1] *ITT Lighting Fixtures*, 255 NLRB 1146 (1981) (Member Zimmerman dissenting).

[2] At the hearing, counsel for the General Counsel introduced evidence that Respondent violated Sec. 8(a)(1) of the Act with respect to certain conduct toward employee Winnie Williams. This conduct concerning Williams was not alleged in the amended consolidated complaint. The Administrative Law Judge found no violations based on this evidence and the incident to which it related.

[3] *ITT Lighting Fixtures*, 261 NLRB 229.

[4] The charge in Case 26-CA-8007 alleged that Respondent violated Sec. 8(a)(1), (4), and (5) of the Act. Respondent moved for summary judgment in Cases 26-CA-8007 and 26-CA-8029. The Board on 18 March 1980 denied Respondent's motion.

vived from Cases 26-CA-7710 and 26-CA-8029. In a 1 July 1981 telegram Administrative Law Judge Robertson granted Respondent's motion that the allegations from Case 26-CA-7710 be dismissed on the ground that those allegations had been part of a complaint that had already been litigated. He thereby rejected the General Counsel's contention that newly discovered evidence entitled him to revive the abandoned allegations. No exceptions were filed to this ruling. The Administrative Law Judge, however, noted that the Case 26-CA-8029 allegation concerning Winnie Williams' transfer on 24 August 1979 had never been part of a case that had already been litigated, and thus was distinguished from the allegations of Case 26-CA-7710. He declined to find that the allegation in Case 26-CA-8029 should have been consolidated with those in Case 26-CA-7710 and, -accordingly, rejected Respondent's motion that the former allegation be dismissed. Subsequently, the Administrative Law Judge issued a Decision finding that Respondent had discriminatorily transferred Winnie Williams as alleged in Case 26-CA-8029.

In its exceptions, Respondent repeats its contention that this allegation is not properly before the Board. The General Counsel counters, in its brief in support of the Decision, that the Williams allegation was properly revived on the basis of newly discovered evidence. He contends that he discovered a pattern of misconduct toward Williams in his investigation of Case 26-CA-8581-2 alleging discriminatory denials of reassignments to Williams which caused him to reconsider the merit of the previously abandoned allegations concerning her transfer to a more onerous position. We find no merit to the General Counsel's contention.

The revival of an allegation specifically abandoned for almost 12 months is improper. The General Counsel's broad discretion over timely filed charges is not unlimited. In this sense, the General Counsel is not a favored litigant, and he is not entitled to any privileges not accorded any other litigant appearing before the Board.[5] Just as respondents are not granted a second chance to litigate allegations against them when their original defense is mishandled, so the General Counsel cannot be granted a second chance to proceed to litigation on an allegation which has deliberately been withheld from the litigation process.[6]

Here, the General Counsel not only abandoned the allegation of Williams' discriminatory transfer for nearly 1 year, but he bypassed the opportunity to litigate this issue in an earlier proceeding, Case 26-CA-7710. As noted above, the Williams allegation was filed on 7 September 1979, before the 9-11 October hearing dates of Case 26-CA-7710. The General Counsel made no attempt to amend the complaint in that case to include the Williams allegation either before or at the hearing. This was in spite of the fact that he presented Winnie Williams as a witness at that hearing and introduced evidence concerning possible 8(a)(1) misconduct toward her, which had not been alleged in the complaint.

Instead, on 16 October 1979 the General Counsel amended the charge in Case 26-CA-8029 deleting all allegations relating to Winnie Williams. The amended consolidated complaint for Cases 26-CA-8029 and 26-CA-8007 issued on 19 October 1979 without any allegations concerning Williams. The General Counsel's abandonment of the Williams allegation continued for nearly 12 months until 30 September 1981. At that time it reappeared in the amended consolidated complaint for Cases 26-CA-8007, 26-CA-8029, 26-CA-8581-2, and 26-CA-7710, now before the Board in this proceeding.

Nor can the General Counsel sustain a claim that newly discovered evidence provides grounds for revival of the Williams allegation. The General Counsel discovered evidence relating to -refusals to reassign Williams in 1980—a year after the disputed transfer occurred. This evidence led him to view the 1979 transfer as part of a pattern of misconduct toward Williams. However, the 1980 refusal to reassign cannot be considered newly discovered evidence on the 1979 transfer because it involves conduct which occurred much later than the transfer and is not directly related to it. The proper procedure would have been for the General Counsel to introduce evidence regarding the 1979 transfer as background material shedding light on the 1980 refusal to reassign.[7]

However, the General Counsel did not follow such procedure. Instead, by his own course of conduct he effectively put Respondent on notice for nearly 12 months that he had no intention of litigating the Williams transfer allegation. The attempt to now revive that allegation in the absence of newly discovered evidence is in direct contravention of the timeliness and finality considerations underlying Section 10(b).[8] The General Counsel does not have an open-ended period of time nor endless series of opportunities in which to litigate an allegation. He does not have the option of indefinitely suspending an allegation so long as there is a timely filed charge to which he can append the long-abandoned allegation. We are mindful that the General

[5] *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961).
[6] See *Union Electric Co.*, 219 NLRB 1081 (1975).
[7] *Machinists, Local 1424 (Bryan Manufacturing Co.) v. NLRB*, 362 U.S. 411 (1960).
[8] See *Koppers Co.*, 163 NLRB 517 (1967).

Counsel is protecting public not private interests but these public interests are not properly served by allowing the General Counsel such a long arm in the -litigation of allegations. At a certain point, equity to the respondent as well as administrative efficiency requires that the General Counsel determine whether he intends to litigate a particular allegation and that he act in a manner which provides the respondent with notice of this intent. The General Counsel here has gone beyond that point.[9]

We, therefore, dismiss this allegation and the complaint in its entirety.[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[9] See *Allis-Chalmers Corp.*, 229 NLRB 190, 191 (1977).

[10] Member Jenkins notes that the motion for partial summary judgment on this issue in *ITT Lighting Fixtures*, 255 NLRB 1146, was denied on the basis of the majority opinion, in which he participated, that material issues existed requiring a hearing and that this denial was without prejudice. He, therefore, finds no conflict between that decision and this. Member Zimmerman notes that the conclusion of this decision is in conformity with his dissent in *ITT Lighting Fixtures, supra*. Chairman Dotson did not participate in the partial summary judgment proceedings.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard in Memphis, Tennessee, on May 18, 19, and 20, 1981. The charge in Case 26-CA-7710 was filed on March 26, 1979, and amended on April 2, 1979.[1] The charge in Case 26-CA-8007 was filed by the Union on August 24, 1979, first amended on September 20, 1979, second amended on October 1, 1979, and third amended on September 23, 1980. The charge in Case 26-CA-8029 was filed by the Union on September 7, 1979, and amended on October 16, 1979. The charge in Case 26-CA-8581-2 was filed by the Union on August 11, 1980. An order consolidating cases, amended complaint and notice of hearing issued on October 19, 1979. On September 30, 1980, an order consolidating cases, amendment to amended consolidated complaint and notice of hearing issued. Subsequently, the complaint was again amended at the hearing. The allegations of unfair labor practices, which remained outstanding at the hearing herein, included allegations that Respondent made unlawful work assignments to its employees Terry Williams, Jerry Hailey, and Winnie Williams; and that Respondent issued three unlawful disciplinary warnings to employee Terry Williams.

Upon the entire record, my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

[1] The allegations flowing from Case 26-CA-7710 were dismissed by my Order dated July 1, 1981.

FINDINGS[2]

A. *Background*

Pursuant to motion by the General Counsel, I took note of the following representation and unfair labor practice cases.

On March 19, 1976, the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, filed a petition in Case 26-RC-5236 seeking to represent employees in Respondent's production and maintenance unit. An election was conducted in that case on May 14, 1976, and certification of results of election issued on May 24, 1976.

On July 14, 1976, in an unpublished order, the National Labor Relations Board adopted, without exceptions, a June 17, 1976, Decision of Administrative Law Judge Almira Stevenson (JD-396-76). That Decision held that Respondent had engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

On December 14, 1978, the Charging Party Union filed a petition in Case 26-RC-5908. On January 3, 1979, there was a preelection hearing; and on February 16, 1979, a secret-ballot election was conducted among the employees in the unit found appropriate. Following timely objections to that election, a notice of hearing on challenges and objections issued on February 28, 1979. On March 21, 22, 23, 24, and 26, 1979, a hearing on objections and challenges was conducted before a hearing officer. The hearing officer's report on objections and challenges issued on April 23, 1979. On July 10, 1979, the Regional Director issued a supplemental decision and certification of representative. In May 1980, the Board issued a Decision on Review in which it affirmed and adopted the certification of representative of the Regional Director. See *ITT Lighting Fixtures*, 249 NLRB 441 (1980).

On August 10, 1979, a consolidated complaint issued in Cases 26-CA-7792, 26-CA-7781, 26-CA-7710, alleging that Respondent had engaged in conduct violative of Section 8(a)(1) and (3) of the Act. Pursuant to that consolidated complaint, a hearing was conducted before Administrative Law Judge Thomas A. Ricci on October 9, 10, and 11, 1979. Administrative Law Judge Ricci's Decision (JD-883-79) issued on December 28, 1979. Administraitve Law Judge Ricci found that Respondent had engaged in conduct violative of Section 8(a)(1) and (3) of the Act. Respondent took exceptions to Administrative Law Judge Ricci's Decision and the matter is presently pending before the Board.

By its decision found at 252 NLRB 328 the Board held that Respondent, by refusing to recognize and bargain

[2] Respondent admitted the commerce allegations in the complaint. On the basis of those allegations and admissions, I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admitted, and I find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is and has been at all times material herein a labor organization within the meaning of Sec. 2(5) of the Act.

with the Union following the July 10, 1979, certification of the Union as exclusive collective-bargaining representative of Respondent's production and maintenance employees, violated Section 8(a)(1) and (5) of the Act. That Board decision issued on September 26, 1980.

B. *Terry Williams*

The Allegation

"On or about May 3, 1979, Respondent discriminatorily assigned its employee Terry Williams to more onerous job duties and on June 11, June 14, and during the first week of August 1979, the exact date being unknown, issued to him disciplinary warnings."

It appears that the above allegation is rooted in the connection that following his return from an illegal suspension from work, Terry Williams was assigned more onerous work which, because of the nature of that work resulted in Williams receiving three disciplinary warnings. In an earlier decision (JD-883-79), Administrative Law Judge Thomas Ricci found that a 3-day suspension awarded Terry Williams on April 28, 1979, constituted an 8(a)(1) violation under the rule of *Weingarten v. NLRB*, 420 U.S. 251 (1975).

Williams testified herein that when he returned from that 3-day suspension, around May 3, 1979, he was assigned to the job of loading trucks for "Transcon." Williams testified that that assignment lasted for approximately 6 months.

There was no dispute that the loading of "Transcon" differed from loading other carriers' trucks. Transcon, unlike three other large carriers, did not furnish a driver for loading purposes. As to the other large trucklines, Respondent's employees would select the items identified on the appropriate bill of lading from Respondent's warehouse and move the goods to the carrier's truck with a pallet jack or a forklift for the carrier's driver to check the goods and load the truck. On Transcon, the additional function of loading the truck was required of Respondent's employees. Williams testified that before his suspension the Transcon work was rotated among all the material handlers.

Williams testified that the Transcon loading was less desirable than other work because (1) the additional work required loading the truck; and (2) since there was no driver available to check the materials against the bills of lading, the possibility of uncorrected mistakes by Respondent's employees was increased.

Subsequent to his May assignment to Transcon, Williams received disciplinary warnings for errors in loads on June 11 and 14 and August 17, 1979.

In order to consider the General Counsel's position, I shall first assume, only for the sake of considering that position, that the Transcon work was more onerous than other loading duties. Therefore, in order to support its allegations, the General Counsel must prove that Williams ws treated in a disparate manner *vis a vis* the Transcom assignments. In that regard, Williams contended that he exclusively was assigned the Transcon loading, beginning May 3 or thereabouts, and that three warnings resulted from that Transcon assignment. The record does not support Williams in that regard.

Contrary to the testimony of Williams, his immediate supervisor, Jo Ann Gray, recalled that she did not assign him the Transcon loading until July. Gray's testimony shows that she treated Williams no differently than others in that other employees were also assigned the Transcon loading in the manner and over similar time periods as Williams. The record supports Gray's testimony. The bills of lading, which were regularly initiated by the employee who loaded each shipment, demonstrated that Williams was not the employee who loaded most of the Transcon shipments during May. Additionally, the first two warnings (June 11 and 14), which Williams recalled receiving after he was assigned to Transcon, reflected that on both of those occasions he was loading for another carrier, Ryder.

In view of that evidence, plus my determination that Jo Ann Gray was a candid witness, I credit her testimony. I was impressed with Gray's demeanor. Gray had previously established that she was sympathetic to the Union. In fact, she was the Charging Party in Case 26-CA-7710. Therefore, the credited evidence shows that Terry Williams was not assigned the Transcon loading duties before July 1979. In view of that finding, it is apparent, and I find, that the General Counsel failed to establish that Terry Williams was assigned the Transcon loading for any longer periods than other employees. Therefore, the General Counsel has failed to show that Terry Williams was treated with disparity.

As to the allegations regarding Terry Williams' June 11 and 14 and August 17 warnings, Williams admitted that he may have committed the errors on which the warnings were based. Undisputed evidence demonstrated that other employees regularly received warnings for similar errors. In view of my finding above that Williams was not unlawfully assigned to Transcon, and in view of the documents showing that the June 11 and 14 warnings did not involve Transcon, it is apparent, and I find, that the warnings did not result from an illegally motivated work assignment. There was no showing that any of the three warnings were otherwise discriminatory.

Therefore, as to the allegations regarding Terry Williams, I find no violation was proved.

C. *Jerry Hailey*

The Allegation

"On or about July 1, 1979, Respondent discriminatorily assigned its employee Jerry Hailey to more onerous job duties."

Case 26-CA-8029, which was filed on September 7, 1979, alleged, *inter alia*, that Jerry Hailey was discriminatorily transferred to a more onerous position because of his union membership and activities and because he gave testimony under the Act.

Hailey testified that, although neither his job classification of maintenance mechanic nor his pay changed, his job duties were changed around the first or second month of 1979. Respondent contends, among other things, that the instant allegation regarding Hailey is time barred since both the first and second months of 1979 are outside the 10(b) period. As to the 10(b) period, an alle-

gation stemming from the September 7 charge would be barred for any period before March 7, 1979. However, it is apparent from Hailey's testimony that the instant allegations, if true, were of a continuing nature. Hailey testified that he was assigned janitor-type duties from the first or second month until the ninth month of 1979. In view of the 10(b) prohibition, I will not consider as possibly violative any action regarding Hailey which occurred before March 7, 1979. However, earlier activity may, and will, be considered as background evidence.

The facts regarding this complaint allegation are not seriously disputed. Hailey's supervisor, J. W. McElhaney, admitted both knowledge of Jerry Hailey's support of the Union at a time before the February 1979 election and that he (McElhaney) was opposed to the Union. McElhaney also admitted that he let the employees in his department know of his opposition to the Union. I have considered those admissions and I have also read the Decision of Administrative Law Judge Ricci (JD-883-79), which clearly demonstrates both knowledge and animus of Supervisor McElhaney. Nevertheless, I must conclude that the instant allegation is not supported by substantial evidence.

Jerry Hailey testified that his job duties were changed between January or February and September 1979. However, the record shows without controversy that it was the regular practice of Respondent to assign its maintenance mechanics various and sundry jobs as occasions arose. Therefore, in order to prevail, it is necessary for the General Counsel to prove, as alleged in the complaint, both that Hailey received more onerous assignments and that Respondent was discriminatorily motivated to make those assignments. Obviously, in considering the element of motivation, the crucial factor is not whether Jerry Hailey believed the assignments were more onerous, but whether Respondent did know, or must have known, that either the assignments were more onerous or, at least, that Hailey would view the assignments as more onerous.

As to the actual knowledge question, Hailey did testify that he advised Respondent of his feelings. Hailey testified:

> I went to [McElhaney] and told him that I didn't think that I needed a high school education, you know, and training, to learn how to cut grass, and you know, empty garbage cans, and all that kind of stuff. To do janitor work.
>
> Well, [McElhaney] told me that—he said a few words like he felt like I was best at that job, or something like that.
>
> * * * * *
>
> I said that I thought that he was prejudiced. I thought that he was prejudice, and there was some more talk.
>
> * * * * *
>
> Well, [McElhaney] denied it. He said he wasn't prejudice, that that wasn't it, and he told me to get out of his office. Told me to go out of his office.

However, Hailey's testimony indicates that the above conversation with McElhaney occurred in September 1979, the last month, according to Hailey's testimony, of the period during which he was assigned tasks which were allegedly more onerous. Therefore, it appears that Hailey's grievance was corrected at approximately the same time he complained to McElhaney. On that basis, I cannot find that Respondent continued to assign Hailey objectionable jobs at a time after Supervisor McElhaney was told of Hailey's dissatisfaction. As shown earlier, the first unfair labor practice charge alleging more onerous assignments was filed the same month—September 1979.

Therefore, I am left with a question of whether from January or February until September 1979 Respondent, by J. W. McElhaney, assigned Hailey tasks which it knew to be more onerous even though McElhaney had received no complaints from Hailey.

The crux of Hailey's complaint herein is that during January or February to September 1979 he was assigned some janitorial work. I readily sympathize with Hailey's complaint. The janitor classification is rated grade 1, whereas Hailey, as maintenance mechanic, was rated grade 9. If he was assigned janitorial tasks which other maintenance mechanics were not, the assignments would be demeaning. However, I must also recognize that Hailey's belief that he was being treated in a demeaning fashion is not by itself sufficient. There should at least be a showing that the assigned tasks were tasks typically assigned janitors or other lower-pay classifications, and which were not routinely assigned other maintenance mechanics.

As to the tasks which Hailey alleged to be janitor work, he testified that during the relevant period he was assigned:

> . . . picking up cardboard. Stuff like that. Around the plant. Cutting grass and burning those old pallets in the incinerator, and cleaning ashes from the incinerator. Stuff like that. And emptying garbage cans.

Hailey was asked if other maintenance mechanics performed those same duties. He responded:

> They were more or less doing—taking care of doing the machine work. What their job classification called for. They wasn't doing none of that. I didn't notice none of them doing the job.

Another witness for the General Counsel, Samuel Alexander, testified that during relevant times he was a maintenance helper. Alexander testified that his job duties as maintenance helper included "cleaning up the yard and the parking lot, burning the pallets, and straightening up the compound, cleaning up outside the pad, and I used to cut the grass."

However, unrebutted evidence offered by Respondent proved that other maintenance mechanics performed

many of the tasks which Jerry Hailey complained as being janitorial in nature. Supervisor J. W. McElhaney testified that maintenance mechanic Robert Hardison was assigned to cut the grass during 1979 and that Hardison actually cut the grass more often than Hailey. McElhaney also testified that the job of burning pallets is normally assigned to maintenance helpers. However, on occasions when one of the maintenance helpers is not available, it is the normal practice to assign a maintenance mechanic to help burn the pallets. McElhaney admitted that he assigned Hailey to pick up cardboard during 1979. However, McElhaney testified without rebuttal that those occasions were rare and were necessitated in order to clean up the area when important visitors were expected. McElhaney also testified without rebuttal that Hailey regularly performed undisputed maintenance mechanic duties during 1979 and that it was only on infrequent occasions when Hailey was assigned to cut grass, burn pallets, or pick up cardboard.

There was no showing on the record that any of the tasks of which Hailey complained were tasks routinely assigned to janitors. The only evidence in support of the General Counsel's position demonstrated that during 1979 Hailey, on occasion was assigned tasks which were usually assigned to the lower pay grade classification of maintenance helper. However, as shown above, unrebutted evidence demonstrated that most of those tasks were also performed on occasion by other maintenance mechanics.

Maintenance mechanic Gerald Bradley was called by Respondent. Bradley testified that he had never been told to do "janitorial work." However, Bradley testified that he interpreted "janitorial work" to mean work "like cleaning up the bathrooms," or sweeping the plant. Bradley testified that he had always been asked to sweep up the shop areas. Additionally, although J. W. McElhaney admitted that Hailey occasionally cut grass, burned pallets, and picked up cardboard during 1979, McElhaney testified that the one job which Hailey did more than any other during 1979 was welding—an undisputed maintenance mechanic job.

Therefore, the record shows that Hailey performed tasks during the January-September 1979 period which were routinely performed by other maintenance mechanics and maintenance helpers. There was no showing that any of his tasks during that period were tasks which were customarily assigned to janitors. Nor was there evidence other than Hailey's beliefs that the tasks he was assigned were demeaning to his position. Therefore, I find that the General Counsel has failed to prove a violation regarding Jerry Hailey. *Fred Jones Mfg. Co.*, 239 NLRB 54 (1978).

D. *Winnie Williams*

The allegations

(a) *"On or about March 16, 1979, Respondent reassigned its employee Winnie Williams from the job of coil winder on a production line and gave her the task of repairing ballasts."*

(b) *"From on or about March 20 to on or about August 24, 1979, Respondent assigned its employee Winnie Williams to various jobs in the Uniflux department."*[3]

(c) *"On or about August 24, 1979, Respondent assigned its employee Winnie Williams the job of greasing tabs on ballasts."*

(d) *"On or about July 28, 1980, Respondent refused the request of its employee Winnie Williams to be assigned from her job of greasing tabs on ballasts to her former job of coil winder."*

(e) *"On or about August 4, 1980, Respondent failed and refused to assign its employee Winnie Williams to a primary coil job and kept her on the job of greasing tabs."*

There is no doubt from the record that Winnie Williams, who worked in Respondent's Uniflux department, was a highly visible union supporter. Winnie Williams was first employed in 1972. Before March 16, 1979, she worked on line 3 in Uniflux. Before the February 16, 1979, election Winnie Williams supported the Union. Her activities included arranging, along with her son Terry Williams (see above), the first union meeting for the employees. Williams discussed the Union with other employees. She wore a "Vote UAW" T-shirt. Respondent stipulated that it was aware of Williams' prounion activities on February 16, 1979.

Williams testified without rebuttal[4] that before March 16, 1979, she was permanently assigned to "doing secondary coil" on line 3 in the Uniflux department under the immediate supervision of Carolyn Smith. Williams was never disciplined. While on line 3, she had an almost perfect attendance record—having only missed work to attend her grandchild's funeral. Williams described her line 3 duties as placing a terminal board and wiring coils, or, if the coil had been stripped before reaching her, she "had to put it around some taps." Williams used a pair of needlenosed pliers in her secondary coil job. She testified that the job did not require lifting and it was not a dirty job. Winnie Williams and the rest of line 3 were rewarded for breaking production with sausage and biscuits a couple of days before she was transferred on March 16.

On March 16—1 month after the election—Williams was removed from line 3 by the foreman of the Uniflux department, Elvin Knight. Knight assigned Williams to the ballasts reject area for the purpose of repairing rejected ballasts.[5] Prior to March 16, Williams worked in

[3] By telegraphic order dated July 1, 1981, I dismissed the complaint allegations designated (a) and (b) above. I shall consider the evidence received in trial regarding those allegations, but only for the purpose of background information.

[4] Winnie Williams' testimony was largely unrebutted. The principal witnesses called in opposition to the allegations regarding Williams were her immediate supervisor on line 2, Lonnie Edlin, and Elvin Knight, who supervised Edlin and the entire Uniflux department. In many respects, Edlin and Knight corroborated the testimony of Williams. To the extent their testimony differs, I credit Winnie Williams. I was impressed with her demeanor and apparent candor. On the other hand, both Edlin and Knight were evasive on cross and both demonstrated confusion and an inability to logically explain under cross-examination their actions regarding Winnie Williams.

[5] This reassignment of Williams was alleged as violative. However, the allegation was dismissed on procedural grounds by my July 1, 1981, Order.

close contact with seven or eight other employees on line 3. In the reject area she worked alone, away from other employees. Williams testified that when she was called into Elvin Knight's office on March 16:

> . . . he told me that Atkins wanted the rejected area cleaned up, and I asked him was I picked for the job, and I asked him why I was picked for the job. . . . And I asked him then, I said, "Well, is it because of my union activities?" and he looked down at the floor. I said, "Well, I've never refused a job, and I won't refuse this one." and that's about all that was said, at that time, that I can remember.

Elvin Knight recalled a similar conversation although he placed the conversation later during the summer of 1979. According to Knight, he denied that Williams' assignment was caused by her union activities. As indicated above, I credit Williams.

On March 21, 22, 23, 24, and 26, 1979, a hearing was conducted on objections and challenges in the February 16 election (Case 26-RC-5908). Winnie Williams was subpoenaed by the Union to attend that hearing. She was called and testified during two of the five hearing days.

Williams testified that by March 20, 1979, she had cleaned up the reject area (repairing a substantial number of the rejected ballasts).

Although Williams continued in ballasts reject after March 20, she was frequently assigned to "greasing tabs" and other jobs on line 2, and "mashing tabs" on all three assembly lines.

During the period from March to August, Williams asked Elvin Knight to return her to her old line 3 job "when this was over." Knight told her "all right," and she returned to her work. Also, during that period of time Williams went to General Foreman Carl McCullar and asked McCullar why she had been moved off her old job. McCullar told her:

> . . . he said he thought the reject area needed a full-time employee, but he had realized then it didn't. I asked him was it because of my union activities, and he said, "I don't think so." He said, "I'll talk to Elvin, and get back to you."

Williams' testimony regarding her conversation with McCullar is unrebutted. McCullar did not testify.

Following her conversation with McCullar, Williams asked Elvin Knight if he had talked with McCullar. Knight replied that he had. Williams asked Knight, "Well, why was I moved off my job? Elvin said, 'I did it. I did it.' That was all that was said."

Williams subsequently went to Personnel Manager Richard Covington and asked Covington why she had been moved off her job and had he had any complaints about her work. Covington replied that he had had no complaints. Williams asked to see her personnel file, telling Covington that she wanted to see if something was in the file that she did not know about. Williams testified that she was shown her personnel file and that it contained no warnings or anything.

In August 1979 Winnie Williams was permanently assigned the job of "greasing tabs" on line 2. Line 2, like the other lines in Uniflux, is involved with assembling ballasts, which are used in Respondent's lighting fixtures. Winnie Williams and the majority of the Uniflux employees are classified as "assemblers" in grade 3. Line 2 assembled the heaviest ballasts. The primary ballasts assembled on line 2 weighed approximately 25 pounds, and the heaviest ballasts assembled on that line weighed over 40 pounds. Only line 2 has a permanent greasing tabs position. In August the employee formerly assigned to greasing tabs resigned her position in order to return to college.

After Williams was assigned the greasing tabs position, Personnel Manager Covington came to her and asked her how much time did she spend sitting down on the job. Williams told Covington that she had to stand probably 75 percent of the time. Williams testified she then asked Covington "was he going to hire somebody for that job? I can't hold out on it. I've got a bad shoulder." Covington told Williams that he did not want to talk about it in the plant and that she should come by his office. Williams subsequently went to Covington's office and told him of her difficulties with the greasing tabs job including the fact that she had "monthly problems." Williams told Covington, "At my age, I can't hold out." Covington responded that he would talk to Elvin Knight.

Williams testified she talked to Elvin Knight the following Monday after Knight told her he wanted to see her in his office. When she got to the office, Knight told her, "I talked to Richard, and that job is yours." Williams testified that she started crying and she told Knight, "I can't hold out to do it, you know I can't. You're wanting me to quit." Williams testified that Knight responded, "No, I'm not. I don't want nobody to quit." Williams stated, "Well, I don't understand why you're putting me on the job, if you're not trying to make me quit out here." Williams testified that she asked Knight who he was getting his orders from, but that Knight just looked down at the floor.

Williams testified that on August 29—she recalled this as being the day after her conversation in which Knight told her the job of greasing tabs was hers—she went to the doctor because she had pulled a muscle in her shoulder from lifting ballasts. Williams was given a disability certificate by the doctor which stated "no heavy lifting for 7 to 10 days."

Williams gave her "disability certificate" to her immediate supervisor, Lonnie Edlin, the following morning. She was thereafter placed on the job of "putting ballasts in heads" on the vertical line. Williams worked the remainder of the week on the vertical line.

At the end of Williams' week on the vertical line she was asked to work overtime by one of the employees on line 1 in Uniflux, Delores Gray. Williams pointed out to Gray that her name had been marked off the overtime list. Gray told her that Knight had said she was on light duty and could not work overtime.

On the following day Winnie Williams went into Elvin Knight's office and asked why her name was marked off the overtime list. Knight replied that she was on light duty. Williams then said, "When did you consider the

vertical line being a light duty line? I've never been on light duty." Knight then told her to disregard the marking of her name off overtime and to come on in, but that she would have to grease tabs when she came in. Williams said okay. However, Williams testified that when she came in on Saturday morning, they needed her on the other end of the line so she did not grease tabs.

Williams testified that the vertical line was one of the fastest lines in the plant and even though the ballasts were not as heavy as the ones on line 2, she would not consider the vertical line to qualify as light duty.

The job of "greasing tabs" included placing grease on tabs in order to insure that those particular parts of the ballasts would not be painted and would, therefore, enable a positive electrical contact, and then lifting the ballast and placing it on a loading cart. Subsequently, when the cart was filled, Williams would push the cart away from the assembly line. Williams testified that because of the weight of the ballasts on line 2 she would have to hold the ballast against her chest when lifting to place the ballast on the loading cart. Therefore, the job was a dirty one because she would get the grease on her clothes. Additionally, Williams testified that the lifting was difficult because of her age—47—and physical condition.

Conclusions

Unlike the circumstances surrounding the case of Jerry Hailey, it is apparent that Respondent was fully aware of Winnie Williams' complaints regarding the greasing tabs job. Moreover, substantial evidence proves that her complaints were not unfounded. One of Respondent's witnesses, employee Rita Webster, who is regarded by Respondent as the most efficient employee on line 2, admitted that greasing tabs was one of the "two worst jobs" in the Uniflux department. Webster testified that greasing tabs were heavy, hot, dirty, and messy.

The record shows that shortly after the February 16 election, Winnie Williams was removed from a job which she had performed well. Subsequently, in March 1979 she testified in Board proceedings. She was eventually permanently assigned to a heavy, hot, dirty, and messy job in August 1979 despite her strong protests. Following her assignment to greasing tabs, Williams has submitted two request from physicians that she be placed on temporary light duty. She has on numerous occasions complained to various supervisors that she is physically unable to continue in the greasing tabs position. Those requests have been rejected.

The evidence failed to show that Respondent has treated any other employee in a similar fashion. One employee was removed from the job of "measuring steel"—the other of the "two worst" Unifluy jobs, according to Rita Webster—to another less demanding job, because of surgery. Another employee, one of Respondent's witnesses, Wilma Tippett, testified that when she was assigned to "heads on the vertical line," she told the supervisor that she was not supposed to left anything heavy. Tippett was immediately reassigned to her job in Uniflux which did not involve lifting. (It is noteworthy that Tippet's complaint involved the same vertical line assignment Winnie Williams was given when she presented her August 29, 1979, light-duty request.) Tippett also testified that she was physically unable to do "wedging," and that Respondent would take her off that job because of her physical problems. Tippett testified that her physical problems stemmed from breast surgery she had 10 years ago.

Respondent did not deny that "greasing tabs" could be handled by an inexperienced employee, even a new hire. Additionally, I note that unrebutted evidence shows other positions in Uniflux have been filled with newly hired employees on occasions since Williams' assignment to greasing tabs.

Respondent, at the hearing, contended through the testimony of Elvin Knight and Lonnie Edlin that Winnie Williams was assigned "greasing tabs" because she was too slow at other line 2 positions. However, those assertions fail to withstand scrutiny in view of other evidence. It was admitted that it is Respondent's practice to talk to employees and, if a need continues, to issue disciplinary warnings when an employee engages in counterproductive conduct. Edlin and Knight testified that Williams was too slow because she talked too much and went to the bathroom too often. However, both admitted that before this hearing no supervisor had ever talked to Williams or issued a warning about her talking or bathroom vists. Moreover, no one has ever mentioned to Williams that her production on any job was too low or too slow.

Additionally, when specifically asked about Williams' speed, Eldin responded only that she was slower than some of the employees.

Moreover, I note that Williams' former supervisor on line 3 was not called regarding her alleged slow production on that line.

The above demonstrates to my satisfaction that Respondent's contention that Winnie Williams was assigned and retained in the greasing tabs position because she was too slow to hold other positions on line 3 (her former job) or line 2 is pretextual. Edlin's testimony that she was "good on coil prep, as far as making a good coil, but she's slower than some of them" demonstrates that some of the "coil prep" employees are slower. Respondent did not explain why Williams had not been warned, or at least cautioned, about either her alleged slowness, her alleged excessive talking, or her alleged excessive bathroom breaks. Nor did Respondent explain why two other employees were accommodated due to their physical difficulties whereas Williams was not.

In view of Respondent's union animus, which is established by the prior cases cited above, its knowledge of Winnie Williams' union activities, the timing of the action against her, and the obvious pretextual basis for assigning and keeping her on the job of greasing tabs, I find that the General Counsel has proven a violation in Respondent's August assignment of Williams to greasing tabs and its retention of her in that position.

In deference to the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), I have also considered whether Respondent proved that Winnie Williams should have been assigned to greasing tabs in the absence of protected activities. I find Respondent has failed to satisfy that burden. The asserted business justification that Winnie

Williams was too slow to perform other tasks cannot be credited as noted above. See *Continental Bus System*, 229 NLRB 1262 (1977); *S. S. Kresge Co.*, 229 NLRB 10 (1977); *St. Joseph Hospital*, 236 NLRB 1450 (1978).

In view of my findings above, it is apparent, and I find, that Respondent continued to violate Section 8(a)(1) and (3) by retaining Winnie Williams in greasing tabs throughout the summer of 1980 when she requested a transfer. However, the record does not contain substantial evidence which would support a finding that Williams should have been awarded another specific job. I find only that Respondent violated the Act by assigning and continuing her in the onerous position of greasing tabs. Any determination as to whether an assignment made in an effort to comply with this decision, qualifies as a position which is not onerous, may be made, if necessary, in compliance proceedings.

CONCLUSIONS OF LAW

1. Respondent ITT Lighting Fixtures, Division of ITT Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by transferring and continuing to retain its employee Winnie Williams in the position of greasing tabs because of her union activities and because she gave testimony in NLRB proceedings, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

4. Respondent did not otherwise engage in unfair labor practices as alleged in the complaint.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

As I found that Respondent unlawfully transferred and retained its employee Winnie Williams in the position of greasing tabs, I shall recommend that Respondent be ordered to offer her immediate transfer to a position which is not onerous, without prejudice to her seniority or other rights and privileges.

[Recommended Order omitted from publication.]